APPENDIX.

OPINION OF SUPREME COURT OF ILLINOIS.

Opinion filed June 14, 1940; rehearing denied Dec. 10, 1940.

Reported, 374 Ill. 594, 30 N. E. (2nd) 497.

Frank C. Leviton, Appellant, v. *Board of Education of the City of Chicago, et al., Appellees.*

Mr. Justice Gunn delivered the opinion of the court:

Appellant, Frank C. Leviton, on behalf of himself and other taxpayers, brought suit against the board of education and certain officials of the city of Chicago, in the circuit court of Cook county, seeking an injunction restraining them from issuing, certifying or selling any bonds for the purpose of satisfying certain judgments against the board of education of the city of Chicago, as purported to be authorized by the act of July 12, 1937. (Laws of 1937, p. 1083.) A motion to dismiss was sustained and the petition dismissed for want of equity.

Appellant, among other things, contends that the act in question violates the constitution of the State of Illinois, which contention gives this court jurisdiction on direct appeal. In the year 1929, school tax levies as extended in the city of Chicago for all school purposes amounted to slightly in excess of $66,000,000, after deducting a reserve for loss and cost of collection. Tax anticipation warrants were issued against this fund in excess of $63,000,000. The total amount of the levy was considerably larger, but, by the time the rate was extended by the county clerk, the valuation of the real estate in the school district had been re-

duced by a new assessment of real estate so that the amount anticipated exceeded seventy-five per cent of the tax which could be collected.

The legislature enacted a law in 1933 authorizing the issuance of $10,000,000 in bonds for the purpose of raising funds to pay the unpaid warrants of the 1929 levy, but this law was held unconstitutional in *Berman* v. *Board of Education*, 360 Ill. 535. At the time of filing this suit, warrants to the amount of about $53,000,000 had been paid, leaving unpaid tax warrants aggregating more than $10,000,000 and there were no funds to pay them. In 1936, the United States District Court rendered a judgment against the board of education of the city of Chicago for the principal sum of $1,090,591.37, in favor of the holder of 1929 school anticipation warrants. This judgment was affirmed by the United States Circuit Court of Appeals. (*Board of Education* v. *Norfolk and Western Railway Co.* 88 Fed. (2) 462.) Prior to the filing of the complaint in this case, numerous suits were brought by holders of such anticipation warrants, and judgments obtained against the board of education in the circuit and superior courts of Cook county, from which no appeal was taken. In 1937, the legislature enacted a law which authorized any school district having a population exceeding 500,000 inhabitants to issue bonds to pay judgment indebtedness based upon the order or decree of any court of record, but provided such bonds should not be issued to pay any judgments rendered for money due upon unpaid claims for services, supplies or materials. The bonds could be issued when authorized by an ordinance adopted by the city council, and could bear interest at the rate of not to exceed five per cent. payable within twenty years and callable at par, plus accrued interest.

On September 15, 1939, steps were taken for the issuance and sale of $80,000 of such bonds purporting to be issued under authority of this statute, to discharge a judgment

obtained in the circuit court of Cook county by F. J. Lewis, in the principal sum of $73,371. The record discloses judgments have been obtained against the board of education in excess of $2,000,000, all based upon the non-payment of the 1929 anticipation warrants, and that it is the intention of the board of education to discharge said judgments by money derived from the sale of the bonds authorized under the act of 1937.

Appellant makes the following contentions: First, that the plaintiff, and those in behalf of whom he sues, are not bound by the decrees and judgments of the several courts above mentioned because tax warrants constituting the basis of liability do not constitute valid obligations of the board; second, the judgments in the circuit and superior courts are constructively fraudulent and not binding on the taxpayers; third, that the act of July 12, 1937, violates section 22 of article 4 of the constitution as being special legislation, and also section 9 of article 9, which prohibits the board of education for levying taxes which will be used for purposes other than corporate purposes.

The school warrants were all issued before the passage of the act of 1935, requiring the warrants to be numbered consecutively and paid in the order of their issuance, beginning with the one having the lowest number. The United States Circuit Court of Appeals held, in substance, that the holders of warrants were entitled to be paid *pro rata* out of the taxes collected, and that the board of education was obligated, as a trustee, to see that each holder of warrants received his share of the funds collected, and directed that the taxes collected from the 1929 levy be distributed, from time to time, and an accounting was ordered to determine the amount due plaintiff in that case. This decision is based on a breach of trust on the part of the board of education in not prorating the 1929 taxes collected, to the holders of warrants, proportionately.

As we read this decision, no accounting is required from anything except the 1929 school taxes, as collected. The ultimate relief depends on the accounting. In so deciding the Circuit Court of appeals relied on the cases holding a city is under obligation to account when it collects assessments for local improvement bonds. In the case of these bonds the holders are entitled to the entire assessment collected and the city merely acts as a collector to distribute all the money *pro rata* on the bonds, to discharge a debt owed. (*Rothschild* v. *Village of Calumet Park*, 350 Ill. 330.) A tax anticipation warrant is simply an assignment of tax money which directs the treasurer to pay the holder. In the alternative, it can be presented to the tax collector in full discharge of taxes. We have repeatedly held no debt is created by an anticipation warrant, (*Berman* v. *Board of Education*, *supra*,) and after delivery there is no future obligation upon it, either absolute or contingent, to pay out of anything except the levy anticipated, when collected. *Diamond* v. *Comr. of Highways*, 366 Ill. 503.

In *City of Springfield* v. *Edwards*, 84 Ill. 626, speaking with reference to the application of taxes to the payment of anticipation warrants, this court said: "The duty remains for the proper officers to collect and pay over the tax in accordance with the appropriation—but obviously for any failure in that regard the remedy must be against the officers and not against the corporation, for otherwise a contingent debt would in this way be incurred by the corporation." This principle is followed in *Booth* v. *Opel*, 244 Ill. 317.

A school district is a *quasi* municipal corporation. (*Roumbos* v. *City of Chicago*, 332 Ill. 70; *Melin* v. *School District*, 312 id. 376; *Kinnare* v. *City of Chicago*, 171 id. 332.) Such *quasi* municipal corporations are not liable for a breach of duty by its officers. (*Elmore* v. *Drainage Comrs.* 135 Ill. 269; *Kinnare* v. *City of Chicago*, 171 id.

332; *Bradbury* v. *Vandalia Drainage District*, 236 id. 36; *Roumbos* v. *City of Chicago, supra.*) In the *Elmore case,* with respect to the liability of a *quasi* corporation, this court said: "So, also, it is admitted law that municipal corporations proper, such as villages, towns and cities which are incorporated by special charters or voluntarily organized under general laws, are liable to individuals injured by their negligent or tortious conduct, or that of their agents and servants, in respect to corporate duties. In regard to public involuntary *quasi* corporations the rule is otherwise, and there is no such implied liability imposed upon them. These latter,—such as counties, townships, school districts, road districts and other similar *quasi* corporations,—exist under general laws of the State, which apportion its territory into local subdivisions, for the purpose of civil and governmental administration, and impose upon the people residing in said several subdivisions, precise and limited public duties, and clothe them with restricted corporation functions, co-extensive with the duties developed upon them. In such organizations the duties, and their correlative powers, are assumed in invitum, and there is no responsibility to respond in damages, in a civil action, for neglect in the performance of duties, *unless such action is given by statute.* (Citations.) * * * The non-liability of the public *quasi* corporation, unless liability is expressly declared, is usually placed upon these grounds: That the corporators are made such *nolens volens,* that their powers are limited and specific, and that no corporate funds are provided which can, without express provision of law, be appropriated to private indemnification. Consequently, in such case, the liability is one of imperfect obligation, and no civil action lies at the suit of an individual for non-performance of the duty imposed."

The cases of *People* v. *Village of Bradley,* 367 Ill. 301, *Rothchild* v. *Village of Calumet Park, supra,* and *Conway*

v. *City of Chicago*, 237 Ill. 128, all involve a city or village which are voluntary corporations and not *quasi* municipal corporations, which fact distinguishes such cases from those above cited dealing with *quasi* municipal corporations.

The judgments of the circuit and superior court are based upon the same grounds as those of the United States Circuit Court of Appeals and no appeal was taken from these judgments.

Appellant says these judgments are void because predicated upon the 1929 warrants. Appellees reply that the board appeared and made defense, and hence all taxpayers are bound by the judgment. Fraud and collusion are not directly charged in the complaint but the fact that judgments were obtained and no appeal taken, together with knowledge of the board officials of the decision in the *Berman case*, is urged as constituting constructive fraud. The situation is anomalous. In the *Berman case* the taxpayer was the plaintiff and the board of education was the defendant. The matter litigated was the right of the board to issue bonds to pay anticipation warrants. The taxpayer urged that the board could not issue and sell such bonds because it was contrary to section 9 of article 9 of the constitution, and this court upheld this contention. The decision held that funds derived from other sources by legislative act, to be used to pay these 1929 warrants, were prohibited by the constitution. The proposed use of the money thus obtained was the controlling factor of the case.

In the case before us, holders of these 1929 warrants obtained judgments against the board of education, which are said to bind the taxpayer so he cannot enjoin the issuance of bonds to pay a claim now reduced to judgment, which we previously held was illegal as violative of section 9 of article 9 of the constitution. It is true that the

public and taxpayers are, in most instances, bound by a judgment against the municipality because they are presumed to have like interests. (*People* v. *Ford*, 289 Ill. 550; *Harmon* v. *Auditor of Public Accounts*, 123 id. 122.) The presumed interest of the taxpayer and the board of education does not actually exist in this case. In the *Berman case* the attitude of the board was adverse to the taxpayers, as it claimed the tax body should be burdened with bonds to pay anticipation warrants and the taxpayers claimed the opposite. In the case at bar, while, presumptively, the board, in filing answers to the suits in the circuit and superior courts, was acting for the public, in reality it was acting adversely, because it is now contending for the same result it prayed in the *Berman case*, namely, to pay the 1929 anticipation warrants, now merged or converted into the form of judgments, with the proceeds of bonds, the principal and interest of which will be paid from new taxes. The record shows a situation akin to *res judicata* in favor of the taxpayer and against the board, because the issue decided in the *Berman case* was illegal authorization of the payment of 1929 tax warrants with money from sources other than the 1929 school tax. The *Berman case* was binding on all questions within the issue. (*Harmon* v. *Auditor of Public Accounts*, *supra*), but the position now taken by the appellees would accomplish the same result in a different manner.

Numerous judgments were obtained, at about the same time, against the board. The board knew a fund created to pay the 1929 school warrants had been held invalid. The interests of the taxpayers and the board of education in respect to raising money for this particular purpose were actually adverse, and the judgments were allowed upon a theory of liability never approved by this court. The judgments thus rendered either had the twenty-nine warrants as a basis of liability or the breach of duty by an officer of a

quasi municipal corporation as a basis of liability, neither of which could create one under the constitution. A judgment so rendered is presumptively void.

In *People* v. *Illinois Central Railroad Co.*, 298 Ill. 516, we quoted with approval from *Lindsay* v. *Allen*, 112 Tenn. 637, where it is said:

> "While it is proper and just that even the rights of the public of and concerning any special matter should be concluded by one fair litigation in which the matters involved were faithfully presented and considered, it should be emphasized that the litigation must be bona fide, fair and honest from beginning to end."

While this was said with respect to a taxpayer binding the municipality, we think it has equal application to a case where the municipality undertakes under present circumstances to bind the taxpayer. The situation renders *People* v. *Ford* and other like cases inapplicable

It is not necessary to decide what effect this situation has on such judgments other than to hold the taxpayers are not barred from contesting the validity of the act of 1937 authorizing bonds to be used as a means of paying them.

The complaint alleges that the act of 1937, authorizing the issuance of bonds to pay these judgments, is void. The motion to strike and dismiss admits the allegations of the complaint. Under the Civil Practice act exhibits are a part of the complaint. The judgment entered in the circuit court, set out in the complaint by way of exhibit, discloses the plaintiff in the Lewis case, for the discharge of whose judgment the $80,000 in bonds are to be issued, owned $35,000 of warrants against the educational fund and $30,000 of warrants against the building fund of the 1929 taxes. The sale of these bonds will furnish money to pay his judgment in full. When these bonds are issued a direct annual tax will be levied to pay principal and interest. If the bonds run for the full period, $4,000 a year for twenty years will

be collected. This tax will be collected to pay interest, and is paid out of money not coming from the 1929 taxes. We assume that all the judgments obtained, and probably all like liability upon the unpaid warrants of 1929, will be discharged in this way. Interest in the sum of $500,000 a year for twenty years is authorized. It is plain that the result of the transaction will be that the board of education will pay out millions of dollars in excess of the amount that could be collected by the holders of the tax warrants from the tax fund itself. In *Berman* v. *Board of Education, supra*, we distinctly held that the holders of tax anticipation warrants must look to the specific tax assigned for the payment of the warrants. In the Berman case the board of education was authorized to issue $10,000,000 for the purpose of paying tax warrants. It was held that this act was void because it violated section 9 of article 9 of the constitution as it authorized the payment of a tax warrant which was not a corporate purpose because a tax warrant does not create a debt. We can not close our eyes to the fact that the only distinction between this case and the Berman case lies in the fact that a judgment has been obtained upon the assumption that the tax warrant creates an obligation which resulted in a debt, and the bonds are issued to discharge the judgment, which will effectuate the very object this court declared to be illegal in the Berman case. In *Green* v. *Hutsonville School District*, 356 Ill. 216, where judgment was obtained for an obligation in excess of the constitutional limit, and years afterwards bonds to an amount within the debt limit were voted to pay this judgment, this court said:

> "We have held that it makes no difference under what guise or by what sort of trick the attempt is made, an indebtedness in excess of the constitutional limit cannot be voluntarily created."

This language is appropriate to the present situation.

In *Dimond* v. *Comr. of Highways, supra,* a suit was brought on an anticipation warrant issued by the commissioner of highways. There was no money collected out of which to pay it, but the legislature had enacted a statute which provided that anticipation warrants of such character could be paid from any available revenue derived from taxes or otherwise. In holding this validating act void the court, in confirming the holding in the Berman case, said: "When the warrant is issued and accepted or sold, the transaction is closed on the part of the municipality, leaving no future obligation upon it either absolute or contingent, whereby its debt may be increased. The holder of such warrant must look to the specific fund set apart for its payment. We pointed out that, under section 9 of article 9 of the constitution, all taxation by municipal corporations must be for corporate purposes, and that bonds purporting to be a general obligation of the municipality and issued in payment of anticipation warrants are not for a corporate purpose and are therefore invalid. It follows that a judgment on such a warrant, the payment of which could be effected from general funds, falls within the same category."

The complaint charges directly that the judgment for which bonds are to be issued is to discharge anticipation warrants. The bonds are a general obligation to be paid from a direct annual tax. The complaint discloses tax warrants have been reduced to judgment and a device is thereby created whereby apparently a judgment, instead of an anticipation warrant, is being paid from other revenues.

We have held the statutory limitation of the amount that may be raised by taxation cannot be avoided by permitting obligations to take the form of judgments. To do so would open the door to an evasion of the statutory limitation of taxation. (*People* v. *Cleveland, Cincinnati, Chicago and St. Louis Railway Co.*, 300 Ill. 368; *Chicago and Alton Railroad Co.* v. *People*, 177 id. 91.) This principle applies

when taxes are levied to be used for a purpose contrary to the provisions of the constitution.

To the extent that the act of July 12, 1937, authorizes bonds to be issued and sold to discharge judgments, based on liability arising out of unpaid tax anticipation warrants, it is void because of the prohibition contained in section 9 of article 9 of the constitution. This makes it unnecessary to pass on the other points raised in the briefs.

The decree of the circuit court is reversed and the cause is remanded, with directions to overrule the motion to dismiss the complaint.

Reversed and remanded, with directions.

Mr. Justice Shaw, dissenting.

OPINION OF SUPREME COURT OF ILLINOIS.

Opinion filed Jan. 20, 1944; rehearing denied Mar. 22, 1944.

Reported, 385 Ill. 599, 53 N. E. (2nd) 596.

Frank C. Leviton, Appellee v. *Board of Education of the City of Chicago, et al., Separate Appellants.*

F. J. Lewis, Appellant.

Mr. Justice Murphy delivered the opinion of the court:

This appeal is a sequel to *Leviton* v. *Board of Education*, 374 Ill. 594. The former appeal was from an order of the circuit court of Cook County allowing a motion to dismiss plaintiff's complaint for want of equity. The order was reversed and the cause remanded with directions to overrule the motion. This appeal is from a decree entered after a hearing of evidence. It enjoins the board of education of the city of Chicago, the president and secretary of the board, the mayor and comptroller of the city from issuing, certifying or selling bonds of the board of education, which bonds were to be issued to obtain funds to satisfy a judgment held by F. J. Lewis against said board of education.

The gist of the complaint, filed by a taxpayer, was that the board was about to exercise a power purported to be conferred by an act of the General Assembly passed in 1937 (Ill. Rev. Stat. 1943, chap. 122, par. 327.62 *et seq.*) which enactment, it was alleged, was unconstitutional when the power conferred therein was to be exercised for the purpose of providing funds to pay judgments such as the one held by F. J. Lewis. On the contentions made on the former appeal we held the act violated the State constitution. Lewis was

not a party to the action until after the cause was remanded, when he was granted leave to intervene. The defendants on the original appeal and Lewis filed separate answers. The allegations of the complaint remained the same as when the cause was remanded. Evidence was introduced and a decree entered as indicated. Lewis appealed to this court urging constitutional questions. The board of education has taken a separate appeal. The board's appeal is in the form of an alternative in that it asks that the decree appealed from be reversed unless it is adjudged that Lewis's judgment is void, in which event, it asks this court to affirm the decree. Lewis does not seek a reversal of the former holding of this court that the statute under which the bonds were to be issued was unconstitutional, but endeavors to bypass the effect of that holding by having it determined that his judgment is final and conclusive of every question litigated in the case in which the judgment was taken and that the same questions cannot be relitigated in this proceeding.

Such contention calls for a brief statement of the facts as admitted by the pleadings and established by the evidence. In December, 1928, and the early part of 1929, the board of education of the city of Chicago levied taxes for the year 1929. They were levied for educational, building and playground purposes. Soon after the levies were adopted, the board of education, pursuant to authorization from the city counsel, issued tax anticipation warrants against each of the three funds. The amount issued against any one fund did not exceed 75 per cent of the levy for that fund and in that regard was within the requirements of section 132 of the School Law. (Ill. Rev. Stat. 1943, chap. 122, par. 155.) Had it not been for events thereafter occurring, the tax levied would have been ample, if collected, to have discharged the anticipation warrants in full. However, the State Tax Commission ordered a reassessment of

all property in the city of Chicago. Such reassessment prevented the county clerk from extending the taxes for the year 1929 until 1931, thereby increasing the amount of interest accruing on the warrants. For causes not material here, the amount of taxes extended was greatly reduced from that provided in the levies. The decrease in the amount of tax extended and the increase in the interest liability presented the situation which gives rise to the litigation in this case and many others of a like character.

After the taxes were collected on the 1929 levy, the board of education applied 75 per cent of the amount collected to the payment of the warrants. After practically all of the available tax money had been so applied, there were unpaid warrants totalling about ten million dollars. Lewis held unpaid warrants against the educational and building funds, but since the principle that controls these warrants is applicable to warrants against both funds, no distinction will be made between them.

The General Assembly adopted an act which became effective July 10, 1933, (Laws of 1933-34, 1st, 2nd and 3rd Special Sessions, page 241,) which undertook to authorize municipalities in the class to which the board of education of the city of Chicago belonged, to issue bonds for the purposes of paying unpaid tax warrants. The validity of this statute was attacked in a taxpayers' suit and on appeal it was held that the statute violated section 9 of article IX, and section 2 of article II of the State constitution. (*Berman* v. *Board of Education*, 360 Ill. 535.) The judgment in this case became final at the June term, 1935, when a petition for rehearing was denied.

In July, 1935, the Norfolk & Western Railway Company started an action against the board of education questioning the method the board had followed in applying the taxes collected on the 1929 levy to the payment of the antici-

pation warrants. The warrants as issued were identified by letter as to the fund against which they were drawn and were numbered beginning with 1 and progressing to the next higher number as each warrant was issued. The numbering appears to have been a matter of convenience and bookkeeping, for the statute, as it then existed, did not require that school anticipation warrants should be numbered, and there was no provision fixing order of payment. The statute has been amended in that regard since that time. The warrants were paid in the order of issue. In the action of the Norfolk & Western Railway Company, a judgment was obtained against the board of education of the city of Chicago in the Federal district court for more than a million dollars. Recovery was allowed on the theory that all anticipation warrants issued against any particular fund were of the same priority in payment and that taxes collected and distributed to the fund should be paid pro rata on all warrants issued against the fund. The decree entered directed that the board of education should apply the money on hand on a prorata basis in part payment of the unpaid warrants, and that tax money subsequently collected should be likewise prorated. An accounting was ordered to determine the amount the plaintiff in that case would have received had the tax money collected prior to the commencement of the suit and used in payments of other warrants in full been prorated to all warrants drawn against the fund. After the amount was determined, judgment was entered against the board for the same. This decree was affirmed in the United States Circuit Court of Appeals. *Norfolk & Western Railway Co.* v. *Board of Education*, 88 Fed. (2d) 462.

Thereafter, other parties holding warrants issued against the 1929 tax levy started suits, some in State courts and others in the Federal court, but all sought recovery upon the same theory as was approved by the Circuit Court of

Appeals in the *Norfolk & Western case.* Some of those cases have proceeded to final judgment while others are pending either on appeal or in the trial courts. Appellant F. J. Lewis obtained a judgment against the board of education for more than $70,000; his right of recovery was founded upon the theory adopted by the Federal Court in the *Norfolk & Western case.*

The act of July 12, 1937, is entitled, "An Act to authorize the board of education of any school district constituted by law in any city having a population exceeding 500,000 inhabitants, to issue bonds to pay judgment indebtedness." Section 1 provides that any school district constituted by law in any city having a population exceeding 500,000 inhabitants is authorized to issue bonds to pay judgment indebtedness based upon an order or decree of any court of record theretofore or thereafter entered. It contains a proviso that bonds shall not be issued to pay any judgments rendered for money due upon unpaid claims for services rendered, for supplies or for material. It regulates the rate of interest the bonds shall bear, their sales at par and that they shall mature within 20 years from their date. Section 6 declares that, before or at the time of issuing the bonds, an ordinance shall be adopted providing for the levy and collection of a direct annual tax upon all the taxable property of the district sufficient in amount to pay the principal and interest. Such tax is to be in addition to, and exclusive of, the maximum of all other taxes which such board of education or such city council is already authorized by law to levy.

In *Berman* v. *Board of Education,* 360 Ill. 535, the act of 1933 which authorized the issuance of bonds to pay anticipation warrants issued against the 1929 levy was considered and held unconstitutional. After a review of the authorities, we said: "From these and numerous other authorities it seems clear that tax anticipation warrants are not debts

and do not represent direct legal obligations of the municipality issuing them. It follows that an appropriation and levy for their payment must fail, since not for a corporate purpose. Where the money is not due as a result of any promise, contract or debt of the municipality, little justification can be found for an appropriation to pay private holders of tax anticipation warrants the moneys which they have failed to collect from the sources to which such collections are exclusively confined. An appropriation for such a purpose certainly could not be deemed an appropriation for a corporate purpose."

In *Dimond* v. *Commissioner of Highway*, 366 Ill. 503, where legislation authorizing the payment of anticipation warrants out of available revenue was under consideration, it was said: "Each of the acts of 1931 and 1933, in providing for the payment of anticipation warrants out of any available revenue derived from taxes or otherwise, other than the fund anticipated, violates section 9 of article IX and the due process clause, of the constitution."

Bonds issued by the defendant board of education to pay outstanding tax anticipation warrants for the years 1928 and 1929 were considered on an objection to a tax levy in *People ex rel. Toman* v. *Granada Apartment Hotel Corp.*, 381 Ill. 41. It was said: "It is settled that legislation authorizing the issuance of bonds for the purpose of liquidating tax anticipation warrants is unconstitutional. * * * The present attempt to accomplish by indirection what obviously can not be done directly represents another effort to obtain liquidation of tax anticipation warrants in contravention of the law."

On the former appeal of this case it was said: "To the extent that the act of July 12, 1937, authorizes bonds to be issued and sold to discharge judgments based on liability arising out of unpaid tax anticipation warrants, it is void

because of the prohibition contained in section 9 of article 9 of the constitution."

From these holdings it must be taken as the established law of this State that a statute which undertakes to authorize the payment of tax anticipation warrants out of revenue other than the levy against which they are drawn transcends constitutional provisions.

Lewis advances various contentions by which he seeks to avoid the application of the foregoing principle to his judgment. He calls attention to the fact that in obtaining his judgments he did not declare upon the warrants but limited his right to recovery to an amount he should have received from the tax money collected on the 1929 levy had it been paid pro rata on all warrants issued against the fund. The difference in the character of the actions does not in itself obviate the application of the rule, for if plaintiff's theory of recovery was but a plan of procedure designed to impose a liability upon the school district to pay a tax anticipation warrant, then the judgment could not be paid from the bond fund, for it would be the using of money, later to be replaced by tax levy, for other than a corporate purpose. The constitutional requirement that it can not be levied for other than corporate purposes can not be circumvented by a mere matter of form. On the former appeal, (374 Ill. 594,) it was pointed out that judgments such as Lewis had must be founded either upon a liability upon the warrants or a liability for the breach of duty by the officers of a quasi-municipal corporation, neither of which could be enforced against the board of education.

Lewis' main contention is that the instant proceeding constitutes a collateral attack upon his judgment and that any inquiry into the facts to determine the basis of the judgment is a relitigation of the issues in the former case.

It can hardly be said that without the inquiry as to the basis of plaintiff's judgment we would not be advised on such matters, for the pleadings and admissions contained therein disclose that Lewis' judgment was to recover that part of the 1929 taxes which he contends he failed to receive by reason of mispayment on other warrants. In plaintiff's suit, based upon his right as a taxpayer, he questions the authority of the board of education to issue and sell the bonds in question. He contends that the issuance of the bonds to provide funds to pay the judgment and the levying of taxes to pay the bonds when they mature, is burdening the district with a liability which it is not obligated by law to pay and would be for other than a corporate purpose. It will be observed that plaintiff's attack is not upon the judgment or any writs issued on it to enforce its collection but upon the right and authority of the board to apply the money derived from a sale of the bonds to the payment of the judgment. When it has been determined, as it was on the former appeal, that an exercise of the power conferred by the statute would constitute the imposition of a liability upon the school district for other than corporate purposes, that would be the extent of plaintiff's recovery and the issuance of the bonds would be enjoined. That would not be a relitigation of any of the issues that were tried in the former case.

It will be observed that the statute in question does not authorize the issuance of bonds for the payment of all judgments but the proviso expressly excludes judgments obtained for services, material or supplies. Conceding, without deciding, that such a classification of judgments would be valid, it would be obvious that, in a suit by a taxpayer to enjoin the application of the proceeds of a bond issue to the payment of a particular judgment, one of the chief issues might be to determine whether the judgment was of the character covered by the statute or whether

it was for items excluded by the proviso. If the record of a judgment be given the conclusiveness contended for by appellant, then inquiry into the purpose for which the judgment liability arises would be closed in such a suit.

However, the decree which awards Lewis a money judgment contains a finding that Lewis was entitled to a judgment against the corporate body "for the respective pro rata amounts of the proceeds of the aforesaid tax levies which the plaintiff should have received, based upon the ratio which the warrants held by plaintiff bear to the total amount of warrants issued, * * *." The record of the judgment discloses the character of Lewis' claim.

The principal distinction between the facts shown by the record on this appeal and the former appeal pertains to two matters. The board of education introduced evidence to show the nature and character of the defenses it interposed in the suit that was prosecuted to the Circuit Court of Appeals and in the cases where Lewis and others obtained judgments against the defendants. This was evidently introduced for the purpose of showing that the board of education used all reasonable diligence and skill in preventing the plaintiffs in those cases from obtaining judgments and that it would not subject Lewis' judgment to an attack on the grounds of fraud, actual or constructive. It is sufficient to say that it is clearly shown that the defenses interposed were made in good faith and that the judgments were not collusively obtained. The views expressed are not drawn from any implications that the litigation was not vigorously defended or that the defenses were not interposed in good faith. The other point of difference is that on the hearing defendants introduced evidence to show the custom and practice followed by this defendant and other municipal corporations in the payment of tax anticipation warrants. The evidence shows that

prior to the decision in the *Norfolk & Western case* in the Federal courts, the custom universally followed was to pay the warrants in the order of their issue. The propriety of that issue can not be inquired into in this case. That was a matter determined in the other proceedings and can not be relitigated in this action.

Appellant Lewis urges other points but in view of our holding on the former appeal and reaffirmed here, that the statute in question is unconstitutional as applied to Lewis' judgment, it is not necessary to consider them.

Appellant Lewis contends that to bar him the right of recovery on his judgment is to violate his rights under the due-process clause of the State and Federal constitutions. He purchased the anticipation warrants charged with the knowledge that they did not create a liability against the school district issuing them. They were in legal effect assignments of sufficient amounts of tax money to pay the principal and interest. After delivery there was no liability upon the municipality issuing them, either absolute or contingent, to pay if the taxes levied proved to be insufficient. It is not a denial of due process to hold that the loss that arises out of such warrants cannot be imposed upon the municipality issuing them.

In its separate appeal, the appellant board of education asks that Lewis' judgment be declared void in this proceeding. The views expressed as to the limited purpose and scope of the inquiry into Lewis' judgment excludes consideration as to whether such judgment is void.

The decree of the circuit court of Cook county was correct and is affirmed.

DECREE AFFIRMED.

OPINION OF UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Norfolk & W. Ry. Co. v. *Board of Education of the City of Chicago, et al.*, 14 Fed. Supp. 475 (1936):

WOODWARD, *District Judge.*

By this suit plaintiff seeks to enjoin the defendants, the board of education of the city of Chicago, the city of Chicago, and certain officers of the board of education and of the city from paying out any money now in the hands of the city treasurer of the city of Chicago arising from the proceeds of taxes extended for educational and building purposes upon the tax levy for 1929, except on a pro rata basis, to the owners and holders of tax anticipation warrants who have not been paid either principal or accrued interest on warrants issued against the educational and building tax levies, respectively, for 1929.

[Here appears a statement of facts similar to the statement appearing in the records here.]

The question arising upon this record may be stated as follows: Should the outstanding educational and building warrants be paid in the numerical order of their issuance until the respective funds are exhausted or shall the fund on hand, and hereafter to be collected, be prorated among the holders of all the outstanding warrants?

These warrants were issued under and pursuant to the terms and provisions of section 132 of the School Law as it read in 1929. Elsewhere in this opinion the text of the material portions of this statute is set out. Under this statute the only source from which moneys could be derived for the payment of the warrants was the proceeds of taxes levied and extended for educational and building pur-

poses for 1929. The statute expressly provides that they shall be paid out of taxes when collected and not otherwise. Under no circumstances do the warrants become the obligations either of the city of Chicago or of the board of education. This was expressly held by the Supreme Court of Illinois in the case of *Berman* v. *Board of Education*, 360 Ill. 535, 196 N. E. 464, 99 A. L. R. 1029, which involved the warrants now in controversy. Under the warrant statute (section 132 of the School Law as amended in 1929), it was the duty of the proper municipal authorities to levy the taxes, to extend the taxes against the real and personal property of the school district subject to taxation, to collect the taxes, and, when collected, to apply the proceeds of the collection to the payment of all warrants issued in anticipation of the taxes. The statute contains no provision for the numbering of the warrants, or that they shall be numbered in the order of their issuance, or that they be paid in numerical order, or in any manner that would result in a priority or preference of one warrant over another. Each of the warrants provided that "taxes are hereby assigned and pledged to the payment of this warrant and of all warrants issued against and in anticipation of such taxes."

All the taxes are assigned and pledged for all the warrants without distinction of any kind. All warrant holders have an equal title to the fund. The legislative intent was that all holders of warrants should participate in the distribution of the fund. The lien of all warrants against the fund was equal, and this equality attached when the warrants were issued. The warrants were to be paid out of a closed and limited fund which was "assigned and pledged" to pay all warrants issued against the fund. All the taxes levied, extended, and collected for educational and building purposes for the year 1929 constituted a trust fund for the benefit of all the warrant holders until all the warrants

issued against such funds were paid and retired. *Rothschild* v. *Village of Calumet Park*, 350 Ill. 330, 183 N. E. 337; *Bankers Life Co.* v. *Elmwood Park*, 280 Ill. App. 524; *People* v. *City of Park Ridge*, 275 Ill. App. 97; *New Orleans* v. *Fisher*, 180 U. S. 185, 21 S. Ct. 347, 45 L. Ed. 485. The warrants were signed by both the city of Chicago and the board of education, and expressly constituted defendants trustees of the proceeds of the tax levies when received by the defendants.

The funds derived from the taxes were levied and collected for a particular purpose. The fund was created to discharge the obligation of the taxing units to the holders of tax anticipation warrants. When the municipality collected those funds and held them in the treasury for application to the payment of the warrants, such funds were impressed with a trust and the municipal corporation holding the funds and charged with their proper disbursement is a trustee. As heretofore noted, there is no primary obligation on the part of the city or the board of education to pay the tax anticipation warrants out of any general fund of the city or of the board of education. The municipal corporations, however, became trustees for the collection and disbursement of the taxes levied and extended to create a fund out of which the tax anticipation warrants might be paid. Authorities cited, *supra*.

This suit is brought to charge the defendants with their obligations as trustees and not to collect from the municipal defendants the face amount, with interest, of the tax anticipation warrants. As above noted, the warrants are to be paid out of a limited and closed fund. There is no inexhaustible power of taxation to replenish the fund. At the time the first warrants were paid, it was not reasonably to be anticipated that the collections from the extended taxes would be sufficient to pay and discharge all of the warrants issued against the educational and build-

ing tax levies. A reassessment had been ordered by the state tax commission. A large part of the taxes were to be produced from extensions against personal property. The country and the city, at that time, were in the midst of an unparalleled financial depression. A large percentage of the taxes extended against personal property, it was reasonable to conclude, never would be collected. In other words, as elsewhere stated, the fund was insolvent at the time the bill was filed and reasonably should have been anticipated to be insolvent at the time the first warrant was paid.

In such case the rule that equality is equity is applied and the fund will be distributed pro rata. Leading textwriters have expounded the rule very clearly.

* * * * *

The rule is also stated and the authorities are reviewed in the case of *Wells* v. *Village of Wilmette*, 193 Ill. App. 30.

Warrants and bonds, which are payable out of a special and limited fund, must share equally and ratably in that fund, since the fund is created for the payment of all the bonds without preference. *Rothschild* v. *Village of Calumet Park, supra; Wells* v. *Village of Wilmette, supra; People* v. *City of Park Ridge*, 275 Ill. App. 97; *Jewell* v. *Superior* (C. C. A.) 135 F. 19; *State* v. *Drainage District*, 334 Mo. 753, 68 S. W. (2d) 671. An exhaustive annotation of cases dealing with this question is found in connection with *State ex rel. Buckwalter* v. *Lakeland*, 112 Fla. 200, 150 So. 508, 90 A. L. R. 704-717.

In *Rothschild* v. *Village of Calumet Park, supra*, it was directly and expressly held that the holders of bonds issued against special assessments were entitled to receive their pro rata share of all of the money collected and received by the village, and that a showing by the plaintiff

that funds applicable to the bonds had been received by the village and that the plaintiff had not received his pro rata share thereof was sufficient to make out a prima facie case entitling plaintiff to recover his pro rata share of money collected. That case does not regard the question of insolvency as being material to the plaintiff's case, but holds that, immediately upon collection of the fund or any part thereof, the bondholders are all entitled to share equally and ratably in the money collected.

A like holding was made in *Wells* v. *Village of Wilmette*, *supra*, where a recovery was sustained by the bondholder against the village, the fund having been exhausted by payment in full of bonds in the order of their presentation.

People ex rel. Decker v. *City of Park Ridge*, *supra*, also holds likewise.

It appears that the law in Illinois is definitely settled to the effect that each warrant holder was entitled to payment upon his warrants pro rata out of all moneys collected and received by the defendants and no warrant holders were at any time entitled to more than a pro rata payment. All of the warrants in this case were past due, according to their maturity dates, before any taxes were collected and before any warrants were paid. Under the law of Illinois, all warrant holders, therefore, stood upon an equal basis as to all of the collections made by the defendants and all were entitled to a pro rata payment out of all of the funds at any time coming into the hands of the defendants from the educational and building levies for the year 1929.

In *Rothschild* v. *Village of Calumet Park*, *supra*, the suit was for an accounting of money collected upon special assessments for the payment of local improvement bonds issued and payable out of said special assessments. That case is similar in all respects to the instant case.

The court there say, 350 Ill. 330, at page 341, 183 N. E. 337, 341:

> "The suit is brought to enforce its liability, as trustee, to pay to the holders of the bonds the money which it received for that purpose, and it is the same, in effect, as an action of assumpsit for money had and received."

The court there further say, 350 Ill. 330, at page 342, 183 N. E. 337, 342:

> "Objection is also made to the decree because it is said that it does not appear that the city has paid the money it has collected to bondholders other than the defendant in error or that it has improperly paid to other bondholders more than their proportionate share. That is no answer to the claim of the defendant in error. His complaint is that the village collected the money for the payment of all the bondholders pro rata and that it did not pay him pro rata—not that it paid somebody else more than his share. It is argued that the burden of proof is on the complainant to show that the money had been improperly applied elsewhere. This is not so. When the defendant in error had shown that the village collected the money applicable to the payment of his bonds and had not paid them, he had met the burden imposed upon him and was entitled to judgment unless the plaintiff in error showed a valid defense."

To the same effect is *Conway* v. *City of Chicago*, 237 Ill. 128, 86 N. E. 619; *Wells* v. *Village of Wilmette*, *supra*, and *People ex rel.* v. *Park Ridge*, *supra*.

It appears from the above cases that it is not essential that the complainant show that the city of Chicago and board of education has misapplied the taxes collected. Whether defendants have paid other warrant holders more than their proper share is immaterial to plaintiff's case. The gist of the plaintiff's cause of action is that the defendants have received taxes from the 1929 levy against

which plaintiff's warrants were issued and the defendants have not paid the plaintiff its pro rata share of such taxes actually received by defendants. This makes out a complete case warranting recovery in favor of the plaintiff and the burden is upon the defendants to show, if they can, a defense to such case.

The court holds that the plaintiff is entitled to recover from the city of Chicago and the board of education its pro rata share of all moneys received by the defendants applicable to the payment of 1929 educational and building warrants as for money had and received to the use of plaintiff, and hence is entitled to an accounting.

* * * * *

The injunctive relief prayed for in plaintiff's bill will be granted and a decree may be entered for an accounting.

Pertinent Provisions of Applicable Sections of Illinois School Act.

(Laws of 1917, pp. 724-732; Smith-Hurd Stat. 1929, Chap. 122, Pars. 151-162.)

§ 128. Each city having a population exceeding 100,000 inhabitants shall constitute one school district which shall maintain a thorough and efficient system of free schools, which shall be under the charge of a board of education, which shall be a body politic and corporate, by the name of "Board of Education of the City of .....," and by that name may sue and be sued in all courts and places where judicial proceedings are had. * * *

§ 129. The board of education shall elect annually, from its own number, a president and vice-president, in such manner and at such time as the board determines by its rules. * * * The board of education shall also elect a secretary, prescribe his duties, term of office and compensation. * * *

§ 131. The board of education shall, subject to the limitations contained in this act, establish by-laws, rules and regulations, which shall have the force of ordinances * * * for the entire management of the schools, * * *

§ 132. The board of education may acquire, by purchase, condemnation or otherwise, real estate for any and all school purposes. * * *

The board of education shall have power to erect or purchase buildings suitable for school houses, for school administration, and for deriving revenues from school lands, and keep the same in repair; and to issue bonds for the purpose of building, furnishing and repairing school houses and school administration buildings and for purchasing sites for the same, and to provide for the payment of said bonds; and when there is not sufficient money in the treasury to meet the ordinary and necessary expenses for educational and for building purposes, to request the city council, whose duty thereupon it shall be, to order issued warrants against and in anticipation of any taxes levied for the payment of the expenditures for educational and for building purposes to the extent of seventy-five per cent of the total amount of the taxes levied for such purposes: Provided, however, that warrants drawn and issued under the provisions of this section shall show upon their face that they are payable solely from said taxes when collected, and not otherwise, at the time fixed therein and shall be received by any collector of taxes in payment of taxes against which they are issued, and such taxes against which said warrants are drawn shall be set apart and held for their payment. Every warrant issued against said taxes shall bear interest, payable annually out of the taxes against which said warrants are drawn, at a rate of not to exceed six per cent per annum, from the date of their issuance until paid, or until notice shall be given by publication in a newspaper or otherwise that the money for the payment of said warrants

is available and that said warrants will be paid on presentation. Provided, however, said rate shall be not to exceed five (5) percent after April 30, 1932. * * *

§ 135. The fiscal year of the board of education shall commence on January 1st unless otherwise determined by the rules of said board. * * *

All moneys raised by taxation for school purposes, or received from the State Common School Fund, or from any other source for school purposes, shall be held by the city treasurer, *ex-officio*, as school treasurer, in separate funds for school purposes, subject to the order of the board of education upon its warrants signed by its president and secretary and countersigned by the mayor and city comptroller.

The city treasurer shall, as school treasurer, secure and safely keep all such moneys, subject to the control and direction of said board of education, and shall, subject to the limitations contained in this act, keep his books and accounts concerning such moneys in such manner as may be prescribed by said board, and said books and accounts shall always be subject to the inspection of said board, or any member thereof. He shall at the end of each and every month, and oftener if required, render under oath an account to the board of education, showing the state of the school treasury at the date of such account and the balance of money in that treasury. He shall also accompany such accounts with a statement of all moneys received into the school treasury, and on what account, together with all warrants redeemed and paid by him; which said warrants, if any, and all vouchers held by him shall be delivered to the business manager of the board and filed with his account in the business manager's office upon every day of such settlement. He shall return all warrants paid by him, stamped or marked "Paid." He shall keep a register

of all warrants redeemed and paid, which shall describe such warrants and show the date, amount, number, the fund from which paid, the name of the person to whom and when paid. • • •

§ 135½. The board of education shall, within the first quarter of each fiscal year, beginning with the year 1930, adopt a budget and shall pass a resolution to be termed the "annual school budget," in and by which annual school budget the said board of education shall appropriate such sums of money as may be required to defray all necessary expenses and liabilities of said board to be paid or incurred during the fiscal year. • • •

§ 136. The board of education shall exercise general supervision and management of the public education and the public school system of the city. • • •

§ 139. The specifications of the powers herein granted are not to be construed as exclusive, but the board of education shall exercise all the powers that may be requisite or proper for the maintenance and the fullest development of an efficient public school system, not inconsistent with those general provisions of the school law of the state which apply to all school districts.

PERTINENT PROVISIONS OF ACT OF JULY 12, 1937.

(Laws of 1937, pp. 1083-1085; Ill. Stat. 1937, Chap. 122, Pars. 327.62-327.68.)

§ 1. Any school district constituted by law in any city having a population exceeding 500,000 inhabitants is authorized to issue bonds to pay judgment indebtedness based upon order or decree of any court of record heretofore or hereafter entered: Provided, bonds shall not be issued to pay any judgments rendered for money due upon unpaid

claims for services rendered, for supplies, or for materials. • • •

§ 2. Whenever the board of education desires to issue such bonds it shall adopt a resolution designating the judgments to be paid and fixing the amount of bonds proposed to be issued, the maturity thereof, the rate of interest thereon, and the amount of taxes to be levied annually for the purpose of paying the principal of and interest upon such bonds and all details of the bond issue. • • •

(41)

SEP 9 19

IN THE

Supreme Court of the United States

October Term, A. D. 1944

No. 330

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. RECONSTRUCTION FINANCE CORPORATION, etc., and 210 other Relators,

Plaintiffs-Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, NELS H. OLSON, F. P. SIEBEL, Sr., MRS. L. ROBERT MELLIN, MRS. W. F. HEINEMAN, WILSON FRANKLAND, SAMUEL LEVIN, JOSEPH W. CREMIN, WALTER TRUC, and B. L. MAJEWSKI, as Members, and JAMES B. McCAHEY, as Member and President,

Defendants-Respondents.

STATEMENT BY RESPONDENTS OF MATTERS AND GROUNDS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

RICHARD S. FOLSOM,
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IN THE

Supreme Court of the United States

October Term, A. D. 1944

No. 330

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. RECONSTRUCTION FINANCE CORPORATION, etc., and 210 other Relators,

Plaintiffs-Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, NELS H. OLSON, F. P. SIEBEL, Sr., MRS. L. ROBERT MELLIN, MRS. W. F. HEINEMAN, WILSON FRANKLAND, SAMUEL LEVIN, JOSEPH W. CREMIN, WALTER TRUC, and B. L. MAJEWSKI, as Members, and JAMES B. McCAHEY, as Member and President,

Defendants-Respondents.

STATEMENT BY RESPONDENTS OF MATTERS AND GROUNDS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

MAY IT PLEASE THE COURT:

Respondents, Board of Education of the City of Chicago, Nels H. Olson, F. P. Siebel, Sr., Mrs. L. Robert Mellin, Mrs. W. F. Heineman, Wilson Frankland, Samuel Levin, Joseph W. Cremin, Walter Truc

and B. L. Majewski, as Members, and James B. McCahey, as Member and President, respectfully present to the court the following matters and grounds making against the jurisdiction of the Supreme Court of the United States of the petition of the People of the State of Illinois on the Relation of Reconstruction Finance Corporation, a corporation of the United States of America, created by Act of Congress, and 210 other judgment creditors of the Board of Education of the City of Chicago, for a writ of certiorari directing the Supreme Court of Illinois to certify to this court the record in the case of the *People of the State of Illinois ex rel. Reconstruction Finance Corporation, et al.* v. *Board of Education of the City of Chicago, et al.*

STATEMENT OF THE CASE

The proceeding with reference to which certiorari is sought was a mandamus suit brought on the relation of the Reconstruction Finance Corporation and other relators designated in the petition for certiorari only as "210 other relators" seeking a writ to compel the Board of Education and its members and President to do all things necessary to pay certain judgments held by them by (1) including in the Board's annual budget for the year 1943 an appropriation of sufficient funds, money and revenues of the Board for said year to pay these judgments, so they may become a part of the appropriation for the payment of which a levy of taxes may be made by the City Council of the City of Chicago (R. 38), and (2) in the alternative command respondents to do all things devolved upon them by law under the Act of July 12, 1937 (Illinois Session Laws of 1937, pp. 1083-1085; Ill. Rev. Stat. 1937, Ch. 122, Pars. 327.62-327.68) to bring about the issuance of bonds of the Board in sufficient amount to provide the funds to pay their judgments plus interest, and bring about the levy of taxes upon all taxable property in Chicago sufficient to pay the bonds at maturity and pay interest when due and out of the proceeds of the sale of bonds to pay petitioners' judgments with interest. (R. 39)

In view of the fact that petitioners in their statement of the case have gone behind the judgments they are seeking to enforce in an effort to show that they are entitled to the relief which they seek, and to give the court the background of the litigation and the facts

upon which the judgments were based and in so doing have omitted some of the facts, we find it necessary to make a complete statement for a correct understanding of the situation.

The Board of Education of the City of Chicago is a special type body politic and corporate, namely a quasi municipal corporation,* created by an act of the General Assembly of the State of Illinois for the sole purpose of maintaining a thorough and efficient system of schools in the City of Chicago. (Illinois Session Laws, 1917, pp. 724-732; Smith-Hurd Ill. Rev. Stats. 1929, Chap. 122, Pars. 151-162, 186; §128-139, 161, of the School Law) This is in accordance with the mandate of the State Constitution which requires that the General Assembly shall provide a thorough and efficient system of free schools whereby all children of the State may receive a good common school education. (Sec. 1, Art. 8, Constitution of the State of Illinois) It has always been the law in Illinois that such quasi municipal corporation is not liable in tort.**

The funds with which to maintain and operate the schools of Chicago under the charge and control of the Board of Education are secured from taxation authorized by the legislature under definite limitations imposed by the State Constitution.***

The Board, like most school districts throughout the state and nation, usually collects the taxes in the year

* See cases hereafter cited, p. 17.

** See cases hereafter cited, p. 17

*** Section 9, Article 9, Constitution of Illinois, provides: "The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property, within the jurisdiction of the body imposing the same."

following that in which expenditures are made. Therefore it is necessary for it to sell tax anticipation warrants to secure funds to operate the schools. The terms and conditions under which such tax anticipation warrants could be issued in 1929 are set forth in Sec. 132 of the then School Act. (Smith-Hurd Ill. Rev. Stats. 1929, Ch. 122, Par. 155, §132) Specifically the Act provides, among other things, that "warrants drawn and issued under the provisions of this section shall show upon their face that they are payable solely from said taxes when collected, and not otherwise, and shall be received by any collector of taxes in payment of taxes against which they are issued, and such taxes against which said warrants are drawn shall be set apart and held for their payment." It was the law when the 1929 warrants were issued and for many years prior thereto that when the warrants are issued they are a closed transaction and are no obligation of the Board.*

Early in 1929 the City Council of the City of Chicago, on the request and demand of the Board, levied taxes for school purposes for the year 1929. (R. 3, *Lewis* v. *Board*) Soon after the levies were adopted the Board of Education, pursuant to authorization from the City Council, issued 1929 tax anticipation warrants against educational, building and playground purposes funds. (R. 5, *Lewis* v. *Board*) The amount issued against any one fund did not exceed 75% of the levy for that fund and in that regard was within the requirements of Sec. 132 of the School Law. (R. 4, 8, 69, *Lewis* v. *Board*) Had it not been for the events thereafter occurring the tax levied would have been ample, if collected, to have discharged the anticipation warrants

* See cases hereafter cited, p. 16.

in full. However, the State Tax Commission ordered a reassessment of all property in the City of Chicago whereby the assessed value was reduced. Such reassessment prevented the County Clerk from extending the taxes for the year 1929 until 1931, thereby increasing the amount of interest accruing on the warrants and the amount of taxes extended was greatly reduced from that provided in the levies. (R. 68, *Lewis* v. *Board*) The decrease in the amount of tax extended and the increase in the interest liability presented the situation which gave rise to the present litigation.

The 1929 warrants were numbered from 1 upwards. (R. 5, *Lewis* v. *Board*) As fast as the 1929 taxes were collected, 1929 warrants were called and paid in full in the order of the number appearing on the face of such warrants, beginning with the lowest number (except those warrants received in the payment of taxes), out of 1929 taxes. (R. 166, 175, 180, *Lewis* v. *Board*) This was in accordance with the general custom and practice of the Board and its officers followed in each year since the 1917 Act, which first authorized said Board to issue tax anticipation warrants, (R. 167-168, *Lewis* v. *Board*) and in accordance with the general practice of the other taxing districts universally followed throughout the State. (R. 168, 171, 173, *Lewis* v. *Board*; *Leviton* v. *Board* opinion R. 244)

In the meantime, because it became apparent that 1929 taxes would not be collected in an amount sufficient to pay approximately $10,000,000 of higher numbered 1929 warrants, the General Assembly adopted an act which became effective on July 10, 1933 (Illinois Session Laws of 1933-34, First, Second and Third Special Sessions, p. 241) which authorized public

corporations of the class of the Board of Education of the City of Chicago to issue bonds for the purpose of paying unpaid tax anticipation warrants. The validity of this statute was attacked in a taxpayers' suit and on appeal it was held that the statute violated Section 9 of Article 9 and Section 2 of Article 2 of the Illinois State Constitution because "* * * tax anticipation warrants are not debts and do not represent direct legal obligations of the municipality issuing them. It follows that an appropriation and levy for their payment must fail, since not for a corporate purpose. Where the money is not due as a result of any promise, contract or debt of the municipality, little justification can be found for an appropriation to pay private holders of tax anticipation warrants the moneys which they have failed to collect from the sources to which such collections are exclusively confined. An appropriation for such a purpose certainly could not be deemed an appropriation for a corporate purpose." (*Berman* v. *Board of Education*, 360 Ill. 535, 542)

July 17, 1935, after the payment in numerical order in full of $39,696,000 of the $46,800,000 of 1929 educational warrants issued and $12,998,000 of the $15,900,000 of 1929 building warrants issued, together with interest on said warrants at the rate of 6% per annum from date of issuance, the first litigation was brought contesting the method used in applying the 1929 taxes to payment of 1929 anticipation warrants. (*Norfolk & Western Ry. Co.* v. *Board of Education, et al.*, 14 Fed. Sup. 475, 88 Fed. (2d) 462) Thereafter other parties holding warrants issued against the 1929 tax levy started suits, some in the State courts and others in the federal court, and after the decree was entered in

the *Norfolk* case, judgments were entered in the other cases on the same theory as that in the *Norfolk* case. The judgments of petitioners here are attached as exhibits to the petition for mandamus in the case at bar. (R. 23-36,*People ex rel. R. F. C.* v. *Board*)

The judgments in each of the cases are practically identical to the one in the case of Reconstruction Finance Corporation. In the Reconstruction Finance Corporation judgment, the court finds that it has jurisdiction of the subject matter and the parties and that the plaintiff is entitled to recover from the Board of Education of the City of Chicago "its pro rata share of all money at any time received and disbursed prior to the commencement of this suit by the defendant, Board of Education of the City of Chicago, as the proceeds of the taxes collected on the tax levies of the Board of Education of the City of Chicago for educational purposes and for building purposes for the year 1929 against which the tax anticipation warrants legally held by this plaintiff were issued." (R. 23)

The court found that large amounts of money had been received by the Board as the proceeds of the taxes collected on account of the levies of 1929 and "that said moneys had been distributed by the Board contrary to law and *in breach of trust*" (emphasis added, R. 23) and that the money so distributed should have been distributed pro rata among all the owners and holders of the then outstanding warrants. It then proceeds to find from the evidence that the plaintiff is entitled to "have judgment * * * for the respective pro rata amounts of the proceeds of the aforesaid tax levies which plaintiff should have received, based upon the ratio which the warrants held by the plaintiff bear

to the total amount of warrants issued, less the warrants surrendered to the County Clerk for the payment of taxes from time to time, together with interest at the rate of five per cent per annum upon said pro rata amounts" (R. 24) excluding interest already paid on the tax anticipation warrants.

The court then finds that the plaintiff is the owner of certain tax anticipation warrants of the taxes levied for the year 1929 aggregating the principal sum of $110,000 and finds from the evidence that the plaintiff upon said basis of computation is entitled to have and recover from the Board the sum of $128,913.50, plus interest. (R. 25)

Prior to the entry of the petitioners' judgments, the General Assembly, on July 12, 1937, passed an Act authorizing the Board of Education of the City of Chicago to issue bonds to pay judgment indebtedness (other than judgments for unpaid claims for school supplies, materials or services rendered) upon order or decree of any court of record theretofore or thereafter entered. (Illinois Session Laws of 1937, pp. 1083-1085; Ill. Rev. Stat. 1937, Ch. 122, Pars. 327.62-327.68)

One of the judgments above referred to was secured by F. J. Lewis. Pursuant to this statute, the Board in 1939 sought to issue and sell bonds for the purpose of paying his judgment. Leviton, a taxpayer, on behalf of himself and all other taxpayers, commenced a suit to enjoin the issuance of these bonds on the ground that the Act authorizing their issuance was unconstitutional, being in violation of Sec. 9 of Article 9 of the Constitution of the State of Illinois. The Supreme Court of the State of Illinois, in *Leviton* v. *Board of Education*, 374 Ill. 594, 605, held that the Act

of July 12, 1937, insofar as it provides for the issuance of bonds to discharge judgments based on liability arising out of unpaid tax anticipation warrants was void because of the prohibition contained in Section 9 of Article 9 of the State Constitution, and remanded the cause with directions to overrule the motion theretofore filed by the Board of Education to dismiss the complaint.

The case was re-docketed in the Circuit Court and the taxpayer's complaint remained the same as when the cause was remanded. The Board of Education filed an answer (R. 67 in *Lewis* v. *Board*) and Lewis was permitted to intervene (R. 51, in *Lewis* v. *Board*) and he filed a separate answer. (R. 51-57, in *Lewis* v. *Board*) Lewis sought to avoid the application of the principle of the established law of the State of Illinois (that a statute which undertakes to authorize the payment of tax anticipation warrants out of revenue other than the levy against which they are drawn, transcends State constitutional provisions) by having it determined that his judgment was final and conclusive of every question litigated in the case in which the judgment was entered and that the same questions could not be re-litigated in the proceeding brought by the taxpayer contesting the validity of the Act of the Legislature of 1937. (Illinois Session Laws of 1937, pp. 1083-1085, Ill. Rev. Stat. 1937, Ch. 122, Pars. 327.62-327.68) The Circuit Court enjoined the Board from issuing and selling the bonds. On appeal the State Supreme Court affirmed. In affirming that decree, the State Supreme Court held that it was not necessary to determine the validity of the judgment obtained by Lewis as owner of 1929 warrants, because the real question was whether any money could be raised by

taxation to pay bonds authorized for the payment of Lewis' judgment based on 1929 tax warrants or on a breach of trust. (*Leviton* v. *Board of Education*, 385 Ill. 599)

At the time Lewis intervened in the Leviton case, the other warrant holders including the Reconstruction Finance Corporation, who had secured judgments, filed a suit for a writ of mandamus (R. 1) seeking to compel the Board to budget their claims and levy taxes for their payment or to issue bonds to pay their judgments and levy new taxes to pay the bonds. (R. 38-39) These judgments were fully described in the petition and copies thereof were attached thereto. Each of the judgments therein set forth shows on its face the basis upon which it was secured. (R. 23-36)

The respondents answered, admitting the judgments were entered but denied any obligation upon the Board to pay them or include them in its annual budget. Respondents further alleged that under the Constitution of Illinois, the Board was required to provide a thorough and efficient system of free schools; that if it was required to make appropriation for the payment of the alleged judgments, it would not have sufficient income to pay said judgments or any part thereof and also continue to comply with its requirement to provide proper schools for children in the Chicago school district, and that it would be compelled to so reduce and curtail the school system and educational facilities that such children would not receive the common school education guaranteed to them by the State Constitution. Respondents in their answer also set forth the limit to which it could raise taxes, together with its resources and liabilities and anticipated school expenses, and that there was no money that could be

raised other than that necessary to defray the necessary expenses of the school system, and that it had no excess revenue to maintain the schools and pay the judgments amounting to over $10,000,000. (R. 40-56)

Petitioners filed a motion to strike which, under the Illinois Practice Act (Ill. Rev. Stats. 1943, Ch. 110, Par. 164, Sec. 40(2), admitted all allegations of fact, including the allegation that the Board had no funds available for the purpose of paying such judgments. The Circuit Court denied their petition for mandamus and on appeal the State Supreme Court affirmed. (*People ex rel. Reconstruction Finance Corp.* v. *Board of Education*, 386 Ill. 522, (R. 66-76))

ARGUMENT

I.

The Supreme Court of Illinois determined this case upon non-federal grounds adequate to sustain its judgment.

The judgment of the Illinois Supreme Court does not depend on the decision of any federal question. It is based solely on non-federal grounds.

An examination of the petition for mandamus discloses that the relief sought was (1) to compel the Board to budget petitioners' claims and levy taxes for their payment, or (2) to issue bonds to secure funds to pay their judgments and levy taxes to pay the bonds. (R. 38-39)

The Supreme Court of Illinois stated the issue presented by the record thus:

> "* * * should the board be compelled by mandamus to budget these claims and levy taxes for their payment? * * * it is not necessary to determine the validity of such judgments in disposing of the real issue of whether the board of education can be compelled by mandamus to levy a new tax to pay judgments showing upon their face that to compel such act will require the board to violate the constitution.
>
> "No question of collateral attack is presented by this issue, but the question is whether the relators are entitled to the remedy sought under the disclosure made by their pleadings." (R. 70-72)

It is apparent that the State Supreme Court, in determining the issue, was considering merely questions of

local and not federal law and decided the case on two non-federal grounds.

The first of these grounds as stated by the court is:

> "The nature and character of the plaintiff's claim being fully disclosed upon the face of the judgment, and indicating facts which would require the officers to violate the constitution in order to levy a tax for its payment, mandamus may properly be refused, not because we invalidate the judgment, but because we cannot require public officers to violate the provisions of the constitution. The alternative prayer that the board be required to do all things necessary to issue bonds under the Judgment Refunding Act of 1937 requires no comment, because of our holding that it is unconstitutional. *Leviton* v. *Board of Education*, No. 27496." (R. 75)

The second non-federal ground is thus stated by the court:

> "Another equally cogent reason for denying *mandamus* in this case is the inability of the board of education to maintain public schools as is required by the constitution, and at the same time levy taxes to pay these judgments. The law has long been settled that the writ of *mandamus* is not a writ of right, and a court, in the exercise of wise judicial discretion, may, in view of the consequences attendant upon its issuance, refuse the writ. (*People ex rel. Akin* v. *Board of Supervisors*, 185 Ill. 288; *People* v. *Ketchum*, 72 Ill. 212) The necessity for the use of the entire revenue by a public body is sufficient to defeat application for a writ of *mandamus* to pay judgments; (*Town of Sparland* v. *Barnes*, 98 Ill. 595; *Board of Supervisors* v. *People*, 222 Ill. 9); and want of funds is a complete answer to a petition for *mandamus*. (*DeWolf* v. *Bowley*, 355 Ill. 530; *Board of Supervisors* v. *People*, 222 Ill. 9.) It is apparent from the financial situation of the board of education, admitted by the relators' failure to answer and dispute it, that it has no funds avail-

able for the purpose, conceding that the relators, on other grounds, were entitled to the writ." (R. 75-76)

Petitioners contend here that they urged a federal question in the State court to the effect that to permit a collateral attack on their judgments or to invalidate their judgments would be to deprive them of property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution. The State Supreme Court in its opinion definitely pointed out that no question of collateral attack was presented by the issue, whether public officials can be compelled by mandamus to levy a new tax to pay judgments showing upon their face that to compel such act will require them to violate the State Constitution, and that it was not necessary to determine the validity of the judgments in order to determine whether a writ of mandamus should issue under the disclosures made in the petition that the judgments are based either on 1929 tax anticipation warrants or breach of duty of an officer of a quasi-municipal corporation as a basis of liability, neither of which could create a corporate liability under the Illinois Constitution. (R. 72-74; *Leviton* v. *Board of Education*, 374 Ill. 594, 602; Pet. Appendix 7-8)

The principles of law applied by the Supreme Court of Illinois are long established and were followed without deviation for many years before the warrants here involved were issued.

It is the long settled Illinois law that tax anticipation warrants create no liability on the issuing body.

In a series of decisions beginning with *City of Springfield* v. *Edwards*, 84 Ill. 626, 633, decided in 1877, the Supreme Court of Illinois established as the law of the State that tax anticipation warrants do not constitute an obligation between the taxing body and the purchaser or holder thereof; that no contractual obligation, either express or implied, on the part of the taxing body arises from the warrant, but that the holder thereof must look solely to the taxes against which the warrant was issued, if and when collected, for payment of the warrant, and that once the warrant is issued there is no further obligation upon the taxing body, either absolute or contingent, to do anything whereby its debt may be increased, and that the holder must rely solely upon the ability and fidelity of the revenue officer in the collection and payment of the money mentioned in the warrants. Among the cases so holding are the following: *Law* v. *People*, 87 Ill. 385, 400; *Fuller* v. *Heath*, 89 Ill. 296, 309; *Hodges* v. *Crowley*, 186 Ill. 305, 312; *Gray* v. *Board of School Inspectors*, 231 Ill. 63, 68, 73; *Booth* v. *Opel*, 244 Ill. 317, 327; *People* v. *Nelson*, 344 Ill. 46, 55; *Dimond* v. *Com'r of Highways*, 366 Ill. 503, 505-506; *People* v. *Wabash Ry. Co.*, 368 Ill. 497, 500-501; *The People* v. *Crane*, 372 Ill. 228, 232; *People* v. *Axelrod*, 373 Ill. 446, 448-449; *People* v. *M. Born & Co.*, 373 Ill. 490, 493; *Berman* v. *Board of Education*, 360 Ill. 535, *Leviton* v. *Board of Education*, 374 Ill. 594, 598, 599; *Leviton* v. *Board of Education*, 385 Ill. 599, 605; *The People* v. *Granada Hotel Corp.*, 381 Ill. 41, 45.

The tax anticipation warrant statute itself specifically provides:

"* * * warrants drawn and issued under the pro-

visions of this section shall show upon their face that they are payable solely from said taxes when collected and not otherwise * * *." (Smith-Hurd Ill. Rev. Stat. 1929, Ch. 122, Par. 155, Sec. 132)

This provision is written into the 1929 warrants.

It is the long established Illinois law that quasi municipal corporations are not liable for breach of trust of their officers or for torts.

Long before the 1929 warrants were issued it was established as the local law of Illinois that a school district, such as the Board of Education of the City of Chicago, is a quasi municipal corporation; that such quasi municipal corporations are not liable for breach of duty by their officers; that such corporations are involuntary quasi municipal corporations, existing under the general laws of the State for the purpose of civil and governmental administration with precise and limited public duties with restricted corporate functions co-extensive with the duties devolved upon them, and as such are not responsible to respond in damages for torts or for breach of trust. *Roumbos* v. *City of Chicago*, 332 Ill. 70, 77; *Melin* v. *School District*, 312 Ill. 376, 382; *Kinnare* v. *City of Chicago*, 171 Ill. 332, 334, 335; *Leviton* v. *Board of Education*, 374 Ill. 594, 598, 599; *Bradbury* v. *Vandalia Drainage Dist.*, 236 Ill. 36, 46; *Elmore* v. *Drainage Comrs.*, 135 Ill. 269, 273, 274.

In the last case mentioned the rule is tersely stated as follows: (p. 273-274)

> "* * * So, also, it is admitted law that municipal corporations proper, such as villages, towns and cities which are incorporated by special charters or voluntarily organized under general laws, are liable to individuals injured by their negligent or tortious

conduct, or that of their agents and servants, in respect to corporate duties. In regard to public involuntary quasi corporations the rule is otherwise, and there is no such implied liability imposed upon them. These latter,—such as counties, townships, school districts, road districts, and other similar quasi corporations,—exist under general laws of the State, which apportion its territory into local subdivisions, for the purposes of civil and governmental administration, and impose upon the people residing in said several subdivisions, precise and limited public duties, and clothe them with restricted corporate functions, co-extensive with the duties devolved upon them. In such organizations the duties, and their correlative powers, are assumed *in invitum*, and there is no responsibility to respond in damages, in a civil action, for neglect in the performance of duties, unless such action is given by statute. 2 Dillon on Mun. Corp., secs. 761, 762; Cooley's Const. Lim. 240, 247; *Hedges* v. *County of Madison*, 1 Gilm. 567; *Town of Waltham* v. *Kemper*, 55 Ill. 346."

It is the long established Illinois law that the State Constitution prohibits taxation for non-corporate purposes.

The courts of Illinois have always held that under the provisions of Section 9 of Article 9 of the Constitution of Illinois of 1870 and similar provisions in prior constitutions, the Board of Education or other public bodies in Illinois are prohibited from levying taxes which will be used for purposes other than corporate purposes. *Sleight* v. *People*, 74 Ill. 47, 49; *Livingston County* v. *Weider*, 64 Ill. 427, 431-432; *Washingtonian Home* v. *City of Chicago*, 157 Ill. 414, 428-429; *Midland Lumber Co.* v. *City of Dallas City*, 276 Ill. 172, 175; *Porter* v. *Lochr*, 332 Ill. 353, 360, 361; *Berman* v. *Board of Education*, 360 Ill. 535, 543, 546, 547; *Leviton* v. *Board of Education*, 374 Ill. 594, 605.

FIRST ADEQUATE NON-FEDERAL BASIS OF STATE COURT DECISION

Where affirmative relief is sought by mandamus the state court may examine the nature of the obligation sought to be enforced and deny the writ if to grant it would compel the public officers to violate the State Constitution or law. Determination of such question is one of local law.

In the face of the foregoing long established rules of Illinois law the state court was confronted with the question as to whether it should issue a writ of mandamus to compel the respondents, Board of Education and its officers, to levy a tax or issue bonds for the payment of judgments where the petition disclosed upon its face that such judgments were based either on 1929 warrants or on a breach of duty of an officer of a quasi municipal corporation. Expressed differently—must the court require public officers to violate the provisions of the constitution and levy a tax for non-corporate purposes simply because the party who seeks mandamus to compel payment of a non-corporate liability appears in the guise of a judgment holder, when the illegal basis of his judgment appears in the mandamus petition and the judgment attached thereto?

The petitioners contend that the state court had no right to examine the judgments made a part of their mandamus petition on the ground that the basis of their judgments was no concern of the court wherein they were seeking mandamus to compel the payment thereof. The state supreme court examined the law on this purely local question and decided that neither the law nor public

policy required, but on the contrary the precedents and the constitution prohibited, the compelling of public officers by mandamus to levy illegal taxes or issue bonds to pay a non-corporate liability.

As recently as May 15, 1944 this court, in *Huddleston* v. *Dwyer*, 321 U. S.;—88 L. ed. 933, recognized the right of the highest court of the state to decide for itself the question as to municipal liability on special assessment bonds and held that this court is bound by such determination of the state court. That case was a suit by owners of special assessment bonds against a county in Oklahoma, alleging diversity of citizenship and seeking a judgment fixing the county's liability and asking mandamus to compel a tax levy for payment of assessments owed by the county and other relief. The District Court first dismissed the complaint, after which the Circuit Court of Appeals reversed and remanded. (*Dwyer* v. *Le Flore County*, 97 F. (2d) 823) The District Court then entered judgment directing the levy of the tax, which judgment was affirmed by the Circuit Court of Appeals (137 F. (2d) 383) after examination of the Oklahoma authorities. One of the county's defenses overruled by the Circuit Court of Appeals was that under Oklahoma law a county is without authority to levy and collect a tax in one year to pay improvement assessments which became due in an earlier year. Subsequent to the decision by the Circuit Court of Appeals on the second appeal, the Supreme Court of Oklahoma held in another case that counties under Oklahoma law are without authority to levy and collect a tax in one year to pay improvement assessments which became due in an earlier year, but that such installments could be paid only from a sinking fund levy. On certiorari, this court vacated the judgment and remanded the case to the Circuit Court

of Appeals with directions to reconsider in the light of the latest decisions of the Supreme Court of Oklahoma on the points of law involved. This court said at page 935 L. ed.

> "State law is the controlling rule of decision in this case as to both substantive and procedural rights of the parties. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487, Federal Rules of Civil Procedure, Rules 69 (a), 81 (b), 28 U. S. C. A. following § 723 (c), 8 F. C. A. 1937 ed. title 28, Appx. 3, pp. 741, 747. It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision. *Meredith* v. *Winter Haven*, 320 U. S. 228, ante 1, 64 S. Ct. 7. And a judgment of a federal court ruled by a state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones. 'Until such time as the case is no longer subjudice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.' *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, 543, 85 L. ed. 327, 330, 61 S. Ct. 347."

When the Supreme Court of Illinois held in this case that mandamus might be properly refused because the nature and character of plaintiffs' claims, as was disclosed upon the face of the judgments, revealed facts that would require public officers to violate the State Constitution if they were compelled to levy a tax to pay the judgments, it was deciding a question of local law well within the right recognized by this court in the foregoing decision.

The decision of the Supreme Court of Illinois upon

this question of local law cannot in any sense be deemed unsubstantial, unfounded or illusory. This court, as well as other federal courts and state courts, has held, as the Supreme Court of Illinois held, that before it will issue a writ of mandamus to compel the payment of a judgment it may properly examine the basis of the judgment when the basis of the judgment appears in the petition for mandamus. If that examination discloses, as in the case at bar, that it was based on a liability never recognized by the courts, and to compel its payment would be to compel a public body and its officials to violate the state constitution, it will refuse to lend its aid to the enforcement thereof. *Brownsville* v. *Loague*, 129 U. S. 493, 503, 505; *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, 292, 293; *Freeland* v. *Williams*, 131 U. S. 405, 419, 420; *Louisiana* v. *Mayor, etc., of New Orleans*, 109 U. S. 285, 289; *Ward* v. *Joslin*, 186 U. S. 142, 152; *Smith* v. *Broderick*, 107 Calif. 644, 653-654; *Brunson* v. *Caskie*, 127 Ga. 501, 502, 503..

In *Freeland* v. *Williams*, 131 U. S. 405, Freeland had obtained a judgment against Williams for the value of cattle taken by Williams under orders as a soldier in the Civil War. Under the applicable law of belligerents, there was no liability for such injuries. This defense was asserted in the suit in which the judgment was entered but declared to be insufficient. Subsequent to the entry of the judgment, West Virginia adopted a constitutional provision prohibiting the enforcement of such judgments. The question presented to this court required going behind the judgment in order to ascertain whether or not it was of such a character as was unenforceable under the new state constitution. This the court did and found the judgment predicated on a doctrine of liability

of belligerents which was contrary to the law of the country.

In *Brownsville* v. *Loague*, 129 U. S. 493, relator sought to compel the payment of a judgment against a public body by mandamus. Under the law of Tennessee there was no inherent power in public corporations to levy taxes. The taxing power was limited to the levying of taxes for the purpose of paying corporate obligations only. The underlying basis of the judgment sought to be enforced by mandamus was bonds upon which there was no corporate liability. This court held, when it was asked to compel the public corporation by mandamus to exercise such specially conferred power of taxation, it would look to the basis of the obligation sought to be enforced and it would not compel the levying of taxes for the payment of the judgment where there was no authority to tax for the payment of the non-corporate obligation underlying the judgment.

Petitioners contend that the Brownsville case is distinguishable from the case at bar because in that case the relator relied upon a special taxing power and not upon his judgment alone. (Petitioners' Brief, p. 37) There is no basis for the claimed distinction. In Illinois, as in Tennessee, there is no inherent or general power in public corporations to levy taxes. Where such power exists in Illinois, it must find its source in Section 9 of Article 9 of the Illinois Constitution. By that section the legislature is vested with authority to delegate tax levying power to public corporations, but the tax levying power so delegated must be limited to the payment of corporate obligations of the taxing body. (See cases cited p. 18) Thus in the case at bar as in the Brownsville case, petitioners are seeking to compel pub-

lic officers to levy a tax for a purpose prohibited by the Constitution. The instant case is squarely within the Brownsville decision.

In *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 292, 293, this court held that when it is asked to enforce a judgment it will look behind the judgment to ascertain whether the subject matter upon which the judgment is founded is within its jurisdiction. That case was an original action in this court by Wisconsin against a Louisiana insurance company under the provisions of the Federal Constitution giving this court original jurisdiction in actions between a state and the citizens of another state. The suit was in debt upon a judgment obtained by Wisconsin in one of her own courts against the Louisiana corporation. The basis of the judgment was a penalty provided by the Wisconsin statutes for doing an insurance business in Wisconsin without first having filed a financial statement with the State Insurance Commissioner. After deciding that the above mentioned constitutional provision did not give the court jurisdiction to enforce the penal laws of the various states, the question arose whether this court could look behind the judgment to ascertain that it was based upon a violation of the penal statutes. In holding that the underlying basis of the judgment determined the court's jurisdiction and that it could look behind the judgment to ascertain such basis, this court said at page 292:

> "The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of

examining into the validity of the claim), from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

In *Louisiana* v. *Mayor, etc., New Orleans*, 109 U. S. 285, 289, relators sought to compel, by mandamus, the payment of judgments for damages arising out of rioting rendered under a state statute imposing such liability on municipalities. After the entry of the judgments the taxing power of the city was so curtailed by a subsequent constitution that, after payment of current expenses, no money was available to pay the judgments. This court did not hesitate to look behind the judgments to see whether they had the contractual basis necessary to render the contract clause of the federal constitution operative or to hold the said clause inapplicable when upon such inspection it appeared that the judgments were not founded in contract.

In *Ward* v. *Joslin*, 186 U. S. 142, 152, this court approved the action of a federal court in examining a judgment secured against a corporation to determine whether the guaranty of a note of a third person on which the judgment was based was within the powers of the corporation or was *ultra vires* in order to determine whether it would invoke its authority to enforce a Kansas statute making stockholders liable for an unpaid judgment against the corporation.

In *Smith* v. *Broderick*, 107 Cal. 644, 653-654, petitioner was assignee of claims of various creditors of the city and county of San Francisco, who had furnished the city with materials and services payable out of special funds for the fiscal year 1892-93, and obtained judgment on the assigned claims. Thereafter he brought mandamus to enforce the auditor to pay said judgment. The

auditor's answer showed the judgments to be based on claims payable only out of the Street Department fund and such surpluses as remained in the general fund for the fiscal year 1892-93 and that both funds were exhausted and had many claims outstanding against them. The California Supreme Court after examining the judgment sought to be enforced found that to compel its payment out of levies for subsequent years would be to compel officers to violate the state constitution and therefore affirmed the denial of the writ, saying at pp. 653-654:

> "The contracts forming the basis of the plaintiff's judgment were not entered into upon the faith that any tax would be levied with which to meet them, but with full knowledge that the municipality was prevented from paying them out of any fund other than the revenue that had already been provided for the fiscal year ending June 30, 1893. None of the remedies which then existed for the enforcement of these contracts have been in any respect impaired. If, at the time of entering into the obligation, there is a limitation upon the extent to which a municipality may enter into such obligation, or upon the extent of taxation for the payment of its liability, or upon the mode in which such payment is to be made, there is no violation of any provision of the constitution, or of any obligation of the municipality, in insisting that the person dealing with it shall be bound by the terms of the law, as they existed when he entered into his dealings with the municipality. The same reasons which would justify the refusal of a writ of mandate to enforce the collection of a judgment by the levy of a tax which is forbidden by law, require the refusal of the writ when sought to enforce a judgment by applying thereto, in contravention of an express provision in the constitution, moneys that have already been collected, and are in the treasury."

The Georgia Supreme Court decided a case involving practically the identical problems here presented in *Brunson* v. *Caskie*, 127 Ga. 501. There a judgment was obtained against a county for injuries received in a defective road. The county, under the basic law of Georgia, was not liable for such a debt and the Constitution of the State of Georgia did not permit the commissioners to levy a tax unauthorized by the Constitution. In denying mandamus and determining the local law of that State, the court said at pages 502-503:

> "It is clear that if the claim for damages which was the subject matter of the plaintiff's suit had not been reduced to judgment, the county commissioners could not be compelled to pay the alleged claim. Further, the county commissioners cannot lawfully levy a tax unauthorized by the Constitution, nor can they divert a fund raised by taxation to the payment of a claim or demand for the satisfaction of which no tax could be constitutionally levied. 'Before an officer can be required to pay out public money, or be justified in doing so, those who demand its payment should be able to show a clear provision of the law which entitles them to receive it.' *Kennedy* v. *Seamans*, 60 Ga. 612; *Houston County* v. *Kersh*, 82 Ga. 252, 255."

In answer to a claim that the judgment finally adjudicated the county's liability, the court held that it was not precluded from ascertaining whether it was one which the court was authorized to enforce and quoted with approval the holding of this court on that subject in *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 292, 293.

Long ago this court established the rule that a judgment holder has no right to a levy of taxes which he did not have before the entry of his judgment. This was determined in *U. S.* v. *County of Macon*, 99 U. S. 582, a proceeding to compel the County to levy a tax for the

purpose of paying a judgment in favor of the relator against the County for the amount of certain coupons upon bonds that had been issued by the County. The statute under which the subscription to the bonds was made contained limits upon the amount of tax that might be levied by the County to pay the same and it was held by this court that although a judgment had been rendered upon the coupons the judgment creditor was not entitled to a writ of mandamus directing the levy of a tax for the payment of the judgment, saying: (p. 591)

> "We have not been referred to any statute which gives a judgment creditor any right to a levy of taxes which he did not have before the judgment. The judgment has the effect of a judicial determination of the validity of his demand, and of the amount that is due, but it gives him no new rights in respect to the means of payment."

SECOND ADEQUATE NON-FEDERAL BASIS OF STATE COURT DECISION

Necessity for use of entire revenue by a public body justifies denial of mandamus to pay judgments.

A second adequate non-federal ground, which in itself was a sufficient basis for the decision, was the admitted inability of the Board to maintain the public schools as required by the Constitution of the State of Illinois and at the same time levy taxes to pay these judgments even if petitioners were entitled to the writ on other grounds. This financial condition was admitted by the pleadings, and this court must accept it as a fact from the record in this case. (*Truax* v. *Corrigan*, 257 U. S. 312, 324)

It is the settled law of Illinois and of the United

States that a public body cannot be required to apply any of its current revenue necessary for the payment of its current expenses in satisfaction of a judgment secured against it. Where its taxing power is limited and insufficient to raise more than the funds so required and appropriated, a court cannot require the public body to use its general funds for the payment of a judgment and a writ of mandamus will not issue for that purpose.

Want of funds is a complete answer to a petition for mandamus and the necessity for the use of the entire revenue by a public body is sufficient to defeat application for a writ of mandamus to pay judgments. *Town of Sparland* v. *Barnes*, 98 Ill. 595; *Board of Supervisors* v. *People*, 222 Ill. 9, 12, 13; *DeWolf* v. *Bowley*, 355 Ill. 530, 538; *The People* v. *Brown*, 281 Ill. 390, 394; *East St. Louis* v. *U. S.*, 110 U. S. 321, 324; *U. S.* v. *Thoman*, 156 U. S. 353, 360; 18 R. C. L. 231, 232.

Petitioner's Cases Distinguished.

An examination of the entire petition for writ of certiorari discloses that petitioners' contention is that wherever a judgment, however baseless, has been entered against a quasi municipal corporation and is unpaid, a court must issue a writ of mandamus to compel its payment even though to do so will require the officers of such quasi municipal corporation to violate the constitution.

It is the position of respondents that the state courts of the State of Illinois had a right and duty to examine the judgments which were set up in and made a constituent part of the petition for mandamus in order to determine whether the basis of the judgment was a corporate obligation for the payment of which a new tax

could be levied to pay the judgments directly, or a tax to be levied for the purpose of paying a bond issue the proceeds of which were to be used for the purpose of paying said judgments.

In such a situation the court does not go behind the judgments for the purpose of invalidating them. It merely examines them for the purpose of determining whether it will lend its aid to their enforcement or deny such aid because to give it would violate the Constitution of the State of Illinois. Notwithstanding this, petitioners cite the following cases to support their contention that their judgments are immune from collateral attack: *U. S.* v. *New Orleans*, 98 U. S. 381; *Louisiana* v. *St. Martin's Parish*, 111 U. S. 716; *Louisiana* v. *Pilsbury*, 105 U. S. 278; *Harshman* v. *Knox County*, 122 U. S. 306; *Santa Fe County* v. *Coler*, 215 U. S. 296; *Moore* v. *Town of Browning*, 373 Ill. 583; *Town of Lyons* v. *Coolidge*, 89 Ill. 529; *Nugent* v. *Toman*, 372 Ill. 170; *Carney* v. *Marseilles*, 136 Ill. 401; *People* v. *Village of Bradley*, 367 Ill. 301; *Drainage Com'rs* v. *Rector Dr. Dist.*, 266 Ill. 536.

An examination of these cases will disclose the soundness of the appraisal by the Illinois Supreme Court of certain of the cited cases and others of similar import when it stated in its opinion (*People ex rel. Reconstruction Finance Corpn.* v. *Board of Education*, 386 Ill. 522) at pages 533-534:

> "* * * In all of these cases power upon the part of the municipality to create the debt existed, and taxes could be levied for its payment. Judgments founded upon such claims were held impervious to attack because, there being power to create the debt, all facts necessary to justify a recovery are concluded by the judgments. Most of the cases, however, recognize the distinction pointed out in the *Loague* case, and recognize its application.

"The distinction between the cases seems plain. (a) If there is authority of law for the creation of the debt, whether it takes the form of bonds, claims, or otherwise, and may be paid from a levy of taxes, *mandamus* may be employed because, there being authority in law to pay such class of claims, a judgment is deemed conclusive of the merits thereof; thus a municipal officer is not compelled to violate the law in doing the things proper to bring about payment. (b) If there is no authority for the creation of the debt, or if a levy of taxes for its payment would be in direct violation of a positive statute or the constitution, and such fact appears as a part of plaintiff's case when seeking *mandamus*, the court will not issue the writ to compel a violation of the constitution, because the judgment gives him no new rights with respect to its payment. *United States* v. *County Court*, 99 U. S. 584, 25 L. ed. 331; *Beadles* v. *Smyser*, 209 U. S. 403, 52 L. ed. 854."

Petitioners also cite a group of cases on the proposition that the taking of property of one and giving it to another violates the constitution: *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55; *Missouri Pacific R. Co.* v. *Nebraska*, 164 U. S. 403; *Ochoa* v. *Hernandez*, 230 U. S. 139; *C. St. P. M. & O. Ry. Co.* v. *Holmberg*, 282 U. S. 162. A consideration of those cases discloses that they deal with situations not analogous to the one presented here.

In the case at bar the refusal of the writ of mandamus does not take away anything from the petitioners which they under the law were entitled to have, nor does it give to the Board of Education anything which belonged to the petitioners. The proceeds from the tax collections were paid to the holders of the tax warrants in full in numerical order of their issuance according to the universal practice and custom that had existed in the State of Illinois ever since tax anticipation warrants were

issued. It was not until after the tax collections of $52,694,000 had been so distributed that the petitioners complained.

When the petitioners purchased their warrants they knew that practice and custom. The judgments gave them no better right than they had before. Certainly it cannot be said that a court which refuses to compel public officials to levy taxes for a non-corporate purpose takes away property of one and gives it to another. As a matter of fact, to issue a writ would be to do that very thing for it would then be taking property of the taxpayer and giving it to the petitioners in payment of obligations not payable by taxation. To compel the taxpayer to pay new and additional taxes in 1943 or later years to pay 1929 warrants or judgments secured on them would constitute double taxation.

The case at bar is in no way analogous to cases cited by petitioners such as *McCullough* v. *Virginia*, 172 U. S. 102; *C. B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, where rights long recognized by courts or established by constitutional or statutory provisions existing at the time claimants' rights accrued were taken away by subsequent constitutional or statutory amendments. All rights which petitioners here had under the warrants, they still have but they seek additional rights by virtue of the fact that they have secured judgments. Neither the constitution nor the statutes of the State of Illinois have been changed in any way for the purpose of reducing or modifying their original rights. The determination by the Supreme Court in this case that mandamus should not issue is in conformity with the law at the time they purchased their warrants and as it had always theretofore existed, namely, that public officers could not be required

to levy taxes for non-corporate obligations, and that quasi municipal corporations are not liable on tax anticipation warrants or for breach of trust by their officers in connection therewith.

The cases cited by petitioners to support their contention that a court has no right to look at the judgment in order to determine whether or not a mandamus writ should issue do not support their position. For example, in *Louisiana* v. *St. Martin's Parish*, 111 U. S. 716, cited by petitioners, this court approved the principle that a court has a right to examine the judgment pleaded in the mandamus proceeding for the purpose of determining whether the municipality had the right originally to create the debt and whether the judgment was based on contract. In *Drainage Dist.* v. *Highway Com'rs*, 238 Ill. 521, the court likewise examined the judgment to determine whether or not the obligation on which said judgment was based was a valid one.

The difference between those cases and the case at bar is that in those cases the court, upon examination, found that the judgments were based upon corporate obligations and therefore issued the writ, whereas the Supreme Court of the State of Illinois in the case at bar, upon examination of the judgment, found that it was not based on a corporate obligation and refused the writ.

Another group of cases involving collateral attack cited by petitioners, such as *Harshman* v. *Knox County*, 122 U. S. 306; *Cromwell* v. *County of Sac*, 94 U. S. 351; *Voorhees* v. *Bank of United States*, 35 U. S. 449, are cases of direct appeals from lower federal courts, to this court. On such direct appeal this court reviews the whole case and decides whether error has been committed under its conception of the law involved. (*Sterling* v.

Constantin, 287 U. S. 387, 393, 394) State courts have the same right. Hence in cases seeking a review of State court decisions this court will not substitute its view for that of the State court where no federal constitutional question is involved even though their views may differ from those of the state court. (*Murdock* v. *Memphis*, 20 Wall. 590) Rules of *res judicata* which are merely rules of estoppel by judgment are solely rules of local procedure and involve no constitutional question.

Petitioners argue that the court did not decide the case on the points raised by the litigants. This is not supported by the record, but, assuming for the sake of argument that the court had determined the case on matters raised by neither party, we submit that a litigant does not have a constitutional nor even a legal right to have his case decided on certain limited points raised by the litigants. This is particularly so where public rights and interests are involved. In such case it is not only the right but the duty of the court to ascertain the proper basis of the decision even though neither party raises the point, for to do otherwise might constitute a precedent which would impair such rights. (*Heppes Co.* v. *City of Chicago*, 260 Ill. 506, 512) All courts seek to render correct decisions that are good so that such cases may be a guide, not a hindrance to future litigation.

Other cases cited by petitioners involve questions which are not even remotely analogous to those in this case. Thus in *City of Cairo* v. *Campbell*, 116 Ill. 305, there was no dispute about a judgment and the only question was whether the demand to include it in the budget was made in time: in *Pennsylvania* v. *Wheeling & Belmont Co.*, 59 U. S. 421, where a judgment was abrogated by an act of Congress, this court held that Con-

gress had such power in matters involving a public right; in *Hodges* v. *Snyder*, 261 U. S. 600, the court held that a curative act passed after the Supreme Court had decided that the original act was invalid did not deprive the taxpayer of a claimed property right in the judgment; in *District of Columbia* v. *Eslin*, 183 U. S. 62, this court decided that an appeal should be dismissed because Congress had taken away the right to sue the district and, a determination of the merits would be futile, since the court could not enforce any judgment it might enter.

When the State Supreme Court held in the case at bar: "The nature and character of the plaintiffs' claim being fully disclosed upon the face of the judgment and indicating facts which would require the officer to violate the constitution in order to levy a tax for its payment, mandamus may properly be refused, not because we invalidate the judgment, but because we cannot require public officers to violate the provisions of the constitution" (R. 75; *People ex rel. R. F. C.* v. *Board of Education*, 386 Ill. 522); it determined the litigation upon non-federal grounds adequate to sustain its judgment.

II.

Where the determination of a state court is upon non-federal grounds adequate to sustain the judgment, this court has no jurisdiction to review.

It has long been established by the decisions of this court commencing with the case of *Klinger* v. *Missouri*, 80 U. S. 257, 263, that even where the state court judgment rests upon two grounds, one of which is federal and the other non-federal in character, this court's jurisdiction fails if the non-federal ground is independent of

the federal ground and adequate to support the judgment. This rule has been reiterated in a long line of cases since that time, among which are: *Arkansas Southern Railroad Co.* v. *German National Bank*, 207 U. S. 270, 275, 276; *Enterprise Irrig. Dist.* v. *Farmers Mut. Canal Co.*, 243 U. S. 157, 164, 165; *Municipal Securities Corpn.* v. *Kansas City*, 246 U. S. 63, 69; *Petrie* v. *Nampa & M. Irrig. Dist.*, 248 U. S. 154, 157; *McCoy* v. *Shaw*, 277 U. S. 302, 303; *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210.

Thus in *Arkansas Southern Railroad Co.* v. *German National Bank*, 207 U. S. 270, 275, 276, this court held that the determination by the State Supreme Court that the railroad was liable under terms of its bill of lading for failure to deliver the goods in accordance with the provisions of the bill of lading regardless of whether the state statute imposing such liability was constitutional, was a determination of a non-federal question sufficient to deprive this court of jurisdiction of the federal question whether the state act was repugnant to the Constitution of the United States as an unauthorized state attempt to regulate commerce among the states.

In *Enterprise Irrig. Dist.* v. *Farmers Mut. Canal Co.*, 243 U. S. 157, 164, 165, this court held that a determination by the state court that there was an estoppel constituted a non-federal question and would not review the federal question of whether the company claiming rights to divert water had been deprived of the same without due process of law.

In *Municipal Securities Corpn.* v. *Kansas City*, 246 U. S. 63, 69, this court dismissed for want of jurisdiction a suit originally brought to recover on city issued special tax bills, by law made liens on lots. Thereafter the

city took the lots for a public improvement, thereby rendering the lots non-taxable. The State Supreme Court held that the suit was upon the tax bill, and under the constitution and the statute of the state the payment of tax bills by the city was forbidden and there could be no recovery on them, and that plaintiff assignee did not secure by his assignment the tort rights of the original holder against the city arising out of the destruction of the lien and only source of payment. The state court's determination of the scope of the assignment and of the issues presented to it was held to be a non-federal question sufficient to deprive this court of jurisdiction.

In *Petrie* v. *Nampa & M. Irrig. Dist.*, 248 U. S. 154, 157, this court held that the decision of the State Supreme Court, that a land owner's objection in a special assessment proceeding was prematurely made, was a determination of a question of local law broad enough to support the judgment, sufficient to deprive this court of jurisdiction to review the decision as to whether or not the special assessment deprived the property owner of his property without due process of law because his property was not benefited by the improvement.

In *McCoy* v. *Shaw*, 277 U. S. 302, 303, this court dismissed a writ of error on the ground that the State Supreme Court, in dismissing a suit to enjoin the collection of a gross production tax on a royalty interest on land patented to an Indian as his homestead, on the ground that under the state statute the petitioner had an adequate remedy at law by paying the tax under protest and suing for its recovery, decided a non-federal question which was independent of the federal question that the tax on the royalties was in violation of the treaties between the United States and the Chickasaw Indians under the Act of Congress.

In *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210, writ of certiorari was dismissed for want of jurisdiction on the ground that the state court in deciding that a void arbitration provision in the contract tainted the entire contract, determined a non-federal question independent of the federal question of whether the contract was in violation of the Sherman Anti-Trust Act.

The State court's decision rests squarely upon non-federal grounds which are independent and adequate to support the State court's judgment, as hereinbefore demonstrated, and therefore the Supreme Court of the United States should decline to take jurisdiction.

Respectfully submitted,

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